

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANICE M. LOWE

Claimant

VS.

AMERICAN PHOENIX, INC.

Respondent

AND

**NATIONAL UNION FIRE INS. CO. OF
PITTSBURGH, PA**

Insurance Carrier

Docket Nos. 1,040,190;
1,040,191; and 1,040,192

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 8, 2008, preliminary hearing Order entered by Special Administrative Law Judge Jerry Shelor. Bruce Alan Brumley, of Topeka, Kansas, appeared for claimant. Katie M. Black, of Kansas City, Kansas, appeared for respondent.

The Special Administrative Law Judge (SALJ) found that claimant suffered personal injury by accident that arose out of and in the course of her employment. Accordingly, respondent was ordered to pay for claimant's medical treatment with Dr. Travis Oller, except that Dr. Oller was not authorized to make referrals to rehabilitation hospitals, for treatment of any mental health problem, or to any treater outside the state of Kansas except in the Kansas City, Missouri, metropolitan area.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 2, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues that claimant's alleged neck and back injuries did not arise out of and in the course of her employment with respondent but, instead, were the result of an altercation with a coworker over a personal matter.

Claimant argues that the altercation with her coworker was related to the conditions and incidents of employment because the fight related to an alleged sexual harassment incident between the coworker and claimant's sister and because respondent allowed the coworker to continue to work despite the sexual harassment, thereby allowing a work hazard to exist. In the event the Board finds the fight was personal in nature, claimant claims the injury is still compensable because her injuries resulted from her fall onto the cement floor at the work site. Last, claimant argues that respondent had reason to anticipate that injury would result if the coworker was allowed to continue working around the sister of the woman who had brought sexual harassment charges against him.

The issue for the Board's review is: Did claimant suffer personal injury by accident that arose out of and in the course of her employment?

FINDINGS OF FACT

Although the SALJ's preliminary hearing Order includes Docket Nos. 1,040,191 and 1,040,192 in the caption, the preliminary hearing held on July 2, 2008, was in Docket No. 1,040,090 only. That docketed claim concerns an incident that occurred on May 5, 2008.

Claimant worked at respondent as an assembly line worker. Some months previous to the incident of May 5, 2008, claimant's sister made an allegation of sexual harassment against a coworker, "Oscar." Oscar was suspended pending investigation of the allegation. After an investigation showed the allegations to be unsubstantiated, Oscar was allowed to return to work. Claimant's sister left her employment at respondent because she did not want to continue working with Oscar.

On May 5, 2008, claimant's sister dropped her off at work. Claimant was sitting on the steps waiting to get into the building before her shift when Oscar and his wife approached. Oscar's wife pointed a finger into claimant's face and made a comment to claimant about her sister. Claimant told Oscar's wife that she did not want to hear that "bullshit."¹ Claimant then stood up and started pointing a finger into Oscar's wife's face, and the two argued. At this point, claimant was hit by Oscar. Claimant fell down onto the cement but then stood back up and hit Oscar. Oscar hit her twice more. Claimant testified

¹ P.H. Trans. at 21.

that Oscar told her, "don't you touch my girl."² Claimant had not had any previous confrontations with either Oscar or his wife.

When asked why Oscar hit her, claimant answered:

Because I told his wife to get her fingers out of my face and she kept pointing 'em and I stood up and she kept coming up the steps coming up towards me and I said get your fingers out of my face and that's when he hit me.³

Claimant admitted she was not arguing with either Oscar or his wife about her job at respondent. However, she contends the incident would not have happened if it had not been for the employment issue of sexual harassment.

Claimant is claiming injuries to her neck and back as a result of the fall onto the cement after she was hit by Oscar.

Antonio Pead, respondent's plant manager, testified that he heard about the incident that morning and immediately walked down the line to speak with claimant. He told her he would be investigating the incident. Claimant continued to work the rest of the day. After speaking with witnesses to the altercation, Mr. Pead terminated both claimant and Oscar.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁴ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁵

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the

² *Id.* at 22.

³ *Id.* at 25-26.

⁴ K.S.A. 2007 Supp. 44-501(a).

⁵ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁶

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Fights between coworkers usually do not arise out of employment and generally will not be compensable.⁷ If an employee is injured in a dispute with another employee over the conditions and incidents of the employment, then the injuries are compensable.⁸ For an assault stemming from a purely personal matter to be compensable, the injured worker must prove either the injuries sustained were exacerbated by an employment hazard,⁹ or the employer had reason to anticipate that injury would result if the co-workers continued to work together.¹⁰

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

⁶ *Id.* at 278.

⁷ See *Addington v. Hall*, 160 Kan. 268, 160 P.2d 649 (1945).

⁸ See *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 506-07, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁹ *Baggett v. B & G Construction*, 21 Kan. App. 2d 347, 900 P.2d 857 (1995).

¹⁰ *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

¹¹ K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS

But for the work-related sexual harassment complaint made by claimant's sister against Oscar, the altercation would not have occurred. Although the altercation did not take place while claimant was clocked in, it did take place on the respondent's premises. The fight was not over a personal matter. Instead, it arose out of the lingering hard feelings and animosity caused by Oscar's alleged sexual harassment of claimant's sister at the workplace. Claimant's sister had filed a complaint with respondent about Oscar's alleged misconduct. Oscar was suspended for two weeks and then returned to work for respondent. It is not clear whether this two-week suspension was a disciplinary measure or was simply during the pendency of the investigation and respondent determined that Oscar had not violated company policy and was not disciplined. Nevertheless, claimant's sister apparently decided she could not continue to work with Oscar and quit her job with respondent. It is not disputed that this was the reason for the fight that occurred on May 5, 2008, between claimant and Oscar, and it is not disputed that claimant's injuries resulted from that altercation.

Based on the record presented to date, claimant has met her burden of proving she was injured in a dispute with another employee over the conditions and incidents of the employment.

CONCLUSION

Claimant suffered personal injury by accident on May 5, 2008, that arose out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Special Administrative Law Judge Jerry Shelor dated July 8, 2008, is affirmed.

IT IS SO ORDERED.

¹² K.S.A. 2007 Supp. 44-555c(k).

Dated this _____ day of September, 2008.

HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Katie M. Black, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Rebecca Sanders, Administrative Law Judge